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NO. 83-854

in the

Supreme Court

of the

United States

October Term, 1983

PHILIP G. NOURSE, as Circuit Court Judge of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida,

Petitioner,

vs.

STATE OF FLORIDA, EX REL DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, DAVID PINGREE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI AND/OR PETITION FOR WRIT OF PROHIBITION TO THE SUPREME COURT OF THE STATE OF FLORIDA AND THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

Philip G. Nourse, as Circuit Court Judge of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida
Room 309, St. Lucie County Courthouse
Fort Pierce, Florida 33450
(305) 464-8904
Counsel/Petitioner

QUESTION PRESENTED FOR REVIEW

Is a trial judge required to protect the constitutional rights of a 13 year old runaway girl against a state agency that exposes the child to serious physical harm and/or death, and if so, does a trial judge who retains jurisdiction of the child have the right under the 8th and 14th Amendments of the United States Constitution to require the committed child to be housed in a safe and secure facility until she is rehabilitated?

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REFERENCE TO THE REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The Order committing the child to the Department of Health and Rehabilitative Services of March 4, 1983, by Circuit Judge Philip G. Nourse is appended to this petition on Page A.

The Order granting prohibition against said Judge by the District Court of Appeal, Fourth District, dated September 14, 1983, is appended to this petition on Page D.

The Order denying Appeal and/or Petition for Common Law Writ of Certiorari and/or Petition for Writ of Prohibition entered by the Supreme Court of the State of Florida on the 28th day of October, 1983, is appended to this petition on Page I of the Appendix.

CONCISE STATEMENT OF THE GROUNDS UPON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

Jurisdiction of the United States Supreme Court is invoked to review the Judgment Order of the Supreme Court of the State of Florida, dated October 28, 1983, affirming the Order of the District Court of Appeal, Fourth District, dated September 30, 1983.

The Supreme Court's jurisdiction to review this matter comes from the inherent authority of the Supreme Court of the United States to issue its extraordinary writs and from 28 United States Code, Section 1257, that states in part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed as follows:
>
> (3) By Writ of Certiorari ...where any title, right,

> privilege or immunity it specially set up or claimed under the Constitution ... of the United States."

and from Rule 17, of the Supreme Court of the United States that states in part:

> "1. A review on writ of certiorari...will be considered...
> (C) When a State Court ... has decided an important question of federal law which has not been but should be, settled by this Court, or had decided a federal question in a way in conflict with applicable decision of this court."

CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES, ORDINANCES AND REGULATIONS INVOLVED

The XIV Amendment of the United States Constitution, in part, recites:

> "...nor shall any state ...deny to any person within its jurisdiction its equal protection of its laws."

The XIV Amendment to the United States Constitution, in part, recites:

> "Excessive bail shall not be required...nor cruel and unusual punishments inflicted."

Florida Statutes, Chapter 39.001 (2)(b) Short title, purposes, and intent, states as follows:

> "To assure to all children brought to the attention of the courts, either as a result of their misconduct or because of neglect or mistreatment by those responsible for their care, the care, guidance,

and control, preferably in each child's own home, which will best serve the moral, emotional, mental, and physical welfare of the child and the best interests of the state." (Emphasis supplied.)

Florida Statutes, Chapter 39.01(21), states as follows:

'"Legal Custody' means a status created by court order ...which vests in a agency...the right and DUTY to protect...him..." (Emphasis supplied.)

Florida Statutes, Chapter 39.01(26), states as follows:

"'Neglect' occurs when legal custodian...deprives a child of, or allows a child to be deprived of...shelter...permits a child to live in an environment when such deprivation or environment causes the child's physical...health to be significantly impaired or to be in danger of being significantly impaired."

CONCISE STATEMENT OF THE CASE

This Petition for Certiorari and/or Prohibition involves an issue of first impression for the Honorable Court, namely as to whether or not a trial judge in committing a 13 year old runaway (over whom jurisdiction is retained) to a state agency can require the state agency to protect the child from death and/or destruction.

Phrased differently, this case found the Petitioner, Philip G. Nourse, Circuit Judge, hereinafter referred to as "the Judge", ordering the Respondent, the Florida Department of Health and Rehabilitative Services, hereinafter referred to as "HRS" to confine a 13 year old runaway girl in a secure facility while HRS was doing their job of rehabilitating the child.

Reducing the case to more specific facts, an order was entered on March 4, 1983, committing Wendy Shaw to HRS for run-a-way rehabilitation since she was a dependent child. This 13 year old, well-built, attractive female child had run away from home at least 13 times and had advised the social worker at the disposition hearing that she was going to continue to run away from home and/or from any institution to which the court would commit her. The case was, and is, very frustrating. The parents agreed to the commitment order (see Appendix, Exhibit "A". The local social workers agreed to the commitment order.

The trial court had ordered HRS to put a fence around the child's camp so the child could not escape to wander

the highways of Florida and be picked up by some pervert to be raped, butchered and thrown into a ditch to die. It is not uncommon in this area of Florida for children to be raped, butchered and thrown into a ditch to die. The trial court wanted no more "Adam Walsh's" in this or the adjoining counties (or anywhere else for that matter), nor did the court want another Jonestown, Guana to develop in Florida.

While the local HRS social workers had no other solution to this case, the "headquarters' staff" based in the Capitol of Florida did not like the idea of having to protect the child from herself and sued this Judge in the District Court of Appeal of the State of Florida, Fourth District, and obtained a Writ of Prohibition against the Judge (see Appendix

"D"). The Judge "appealed" and "petitioned" the Florida Supreme Court for a Writ of Prohibition and/or Certiorari against the District Court of Appeal, Fourth District, which was denied. (See Appendix, Exhibit "I".) This Petition to the Supreme Court of the United States for a Writ of Certiorari and/or Prohibition is directed to the Florida Supreme Court and the District Court of Appeal, Fourth District, and seeks an order prohibiting the Florida Supreme Court, the District Court of Appeal, Fourth District, and HRS from interfering with the trial court's duty to protect a child's federal constitutional right to a safe and secure rehabilitation.

REASON FOR GRANTING THE WRITS

ISSUE: Is a trial judge required to protect the constitutional rights of a 13 year old runaway girl against a state agency which exposes the child to serious physical harm and/or death, and if so, does a trial judge who retains jurisdiction have the right under the 8th and 14th Amendments of the Constitution of the United States to require the committed child to be housed in a safe and secure facility until she is rehabilitated?

In Florida a 13 year old dependent girl has no attorney to look after her constitutional rights. Hundreds of these cases are processed through the Juvenile Court of St. Lucie County each year. This county has a population of about 100,000 people. Any child who constantly runs away from home and otherwise disobeys her parents is a dependent child and must be helped; for not to help the

child is to allow her to be deprived of an education, to go on drugs, to become pregnant, to become another child prostitute, to commit suicide, or to be destroyed wandering around a state full of transients and perverts who are looking for a fresh potential victim.

Is there anything illegal or wrong about a judge looking out for the constitutional rights of a child?

The Florida Legislature by virtue of Chapter 39, and particularly Florida Statute 39.001(2)(b) has, and still is, trying to help children by telling courts to look after a "child's moral, mental, emotional, and physical welfare." Almost all of the employees of HRS want to do this with the exception of those employees who place the prestige of their agency above the welfare of those

they are supposed to serve. "The King can do no wrong" they feel. (A good analogy is the "non acquiese" policy of the IRS in its dealings with its citizens and their courts.) Every "King" since time began has made mistakes and so did HRS in failing to protect this child with a safe environment.

As we all recognize, the Constitution of the United States states that our federal and state government must not inflict "cruel and unusual punishment" upon its citizens. History has provided excellent reasons for this law. Is it not cruel and unusual punishment for a judge to release an unrehabilitated child to go home to commit other additional crimes? Is it not also cruel and unusual punishment for a judge to

commit a child to an institution that the judge knows to be unsafe? The judge must "rule" for he/she cannot put his/her head in the sand and do nothing. Here both the parents and the "HRS grass root employees" consented and/or had no other solution to the problem. Each had been warned a month earlier in a previous hearing that the Court knew of no other alternative and asked for suggestions. Unfortunately none were forthcoming. So when the Court found its own solution "the King" sat back and conducted a "Monday night quarterback session" but still devoid of an alternative solution. Perhaps every "King" should be required to be a "front line soldier" before he orders his soldiers to fight a war. After all, if you want kids to obey their parents and the law you MUST NOT let them thumb their noses at the judge

and get away with it.

The 14th Amendment to the Constitution of the Unites States requires "equal treatment" to each citizen. These are beautiful words. Does not the Constitution of the United States require a safe facility for adult prisoners?

Read Procunier v. Martinez, 416 U.S. 396, 40 L.Ed.2d 224 (1974), where the United States Supreme Court not only took jurisdiction of California inmates' complaints of constitutional rights violations but the United States Supreme Court struck down administrative rules (like HRS) on censorship and rehabilitation. They said in Headnote 4:

> "A policy of judicial restraint with respect to problems of prison administration cannot encompass any failure to take cognizance of valid constitutional

claims whether arising in a federal or state institution and when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."

On Page 412, the court said:

"The identifiable governmental interests at stake in this task are...the maintenance of institutional security against escape..."

In Pugh v. Locke, 406 F.Supp. 318 (1976), the court said in Headnote 3:

"While federal courts continue to recognize broad discretion required for state prison officials to maintain orderly and secure institutions, constitutional deprivations of such magnitude as allow maintenance of facilities that are wholly unfit for human habitation cannot be countenanced, and courts are under a duty to, and will, intervene to protect incarcerated citizens from

such wholesale infringements of their constitutional rights.

Headnote 9, states:

"Content of Eight Amendment is not static but must draw its meaning from evolving standards of decency that mark the progress of a maturing society."

Headnote 12, states:

"Prison officials are under a duty to provide inmates reasonable protection from constant threat of violence."

Headnote 16, states:

"Prisoners are protected by the due process and equal protection clauses of the Fourteenth Amendment and, therefore, must be free from arbitrary and capricious treatment by prison officials."

In Woodhous v. Commonwealth of Virginia, 487 Fed.2d 889 (1973), it was said in Headnote 2:

"Prisoner has constitutional right to be reasonably protected from constant threat of violence and sexual assault by fellow inmates and need not wait until he is actually assaulted to obtain relief."

Although federal courts are reluctant to intervene in the day-to-day operation of state penal systems, it is their duty to protect incarcerated citizens from infringements of their constitutional rights and to intervene in cases where prison officials act in derogation of those rights. Hutto v. Finney, 437 U.S. 678 (1978); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974); Cruz v. Bato, 405 U.S. 319 (1972); Johnson v. Avery, 393 U.S. 483 (1969); Battle v. Anderson, 564 F.2d at 392 (10th Cir. 1977); Bethea v. Crouse, 417 F.2d 504, 506-07 (10th Cir. 1969); Montova v.

Tanksley, 446 F.Supp. 226 (D. Colo. 1978); Smith v. Sullivan, 611 F.2d 1039, 1044 (5th Cir. 1980); Preston v. Thompson, 589 F.2d 300 (7th Cir. 1978). Once the federal courts find an Eighth Amendment violation, they have the duty to use their remedial powers to make their intervention effective. Smith v. Sullivan, 611 F.2d at 1044.

The trial court in this case, having found an Eighth Amendment violation, had considerable discretion to devise a remedy. Preston v. Thompson, 589 F.2d at 30. The law is clear that the court's equitable power to remedy constitutional violations is broad and flexible and must be molded by the facts and necessities of the violation. Hutto v. Finney, 437 U.S.

678 (1978); Milliken v. Bradley, 433 U.S. 267 (1977); Swan v. Charlotte Macklenberg Bd. of Education, 402 U.S. 1 (1971). "To prevent further constitutional deprivations, a court may order forms of relief not normally required by the Constitution but nevertheless necessary given the circumstances if the court's efforts are to be successful." Smith v. Sullivan, 611 F.2d at 1044 (citations omitted). See also Williams v. Edwards, 547 F.2d 1206, 1212 (5th Cir. 1977).

Do the courts discriminate against helpless unrepresented little children by giving adults their right to a safe confinement and denying the right of a "safe confinement" to children? Children need equal treatment and have a constitutional right to equal treatment.

Returning now to the jurisdiction of the Supreme Court of the United States we find in Kent v. United States, 383 US 54[illegible] L ed 2d 84, 86 S Ct 1045, on page 551, this court's admission that jurisdiction does exist when the court stated

> "They also suggest basic issues as to the justifiability of affording a juvenile less protection than is accorded to adults suspected of criminal offenses, particularly where, as here, there is an absence of any indication that the denial of rights available to adults was offset, mitigated or explained by action of the Government, as parens patriae, evidencing the special solicitude for juveniles commanded by the Juvenile Court Act. However, because we remand the case on account of the procedural error with respect to waiver of jurisdiction, we do not pass upon these questions."

CONCLUSION

The issue was:

> Is a trial judge required to protect the constitutional rights of a 13 year old runaway girl against a state agency which exposes the child to serious physical harm and/or death, and if so, does a trial judge have the right under the 8th and 14th Amendments of the Constitution of the United States to require the committed child to be housed in a safe and secure facility until she is rehabilitated?

The foregoing legal material WITHOUT QUESTION establishes a child has a federally protected constitutional right to a safe place of confinement while she is being rehabilitated. (This Judge never told HRS how to rehabilitate the child.) This is an OPEN UNDECIDED question of law. The facts as determined

by the trial court establishes the fact that a temporary secure confinement must be provided for the child who is a serious danger to herself. The decision of the lower courts indicate a misunderstanding of the Constitution of the Unites States and the rulings of the Supreme Court of the United States. This Judge has stuck his neck way out for this kid, which, of course, is irrelevant. What is relevant is that thousands of unrepresented defenseless kids, yesterday, today and tomorrow beg for help from the "mightest court" in the world. Even though you all are grossly overworked, please help the kids and assume the jurisdiction that you have on this open undecided federal question of vital importance to little kids. Their lives are in the hands of each of you -- each of you Justices,

and this author, who after all, were former children and who had others looking after us -- but for thousands of kids less fortunate than you or I; HELP is drastically needed NOW.

For any of the foregoing reasons, the Petition for Writ of Certiorari and/or Prohibition should be granted.

Respectfully submitted,

s/ Philip G. Nourse

PHILIP G. NOURSE,
Petitioner
Room 309, St. Lucie
County Courthouse
Fort Pierce, Florida
33450
305/464-8904
Authorized to practice
law in the Supreme
Court of the United
States on July 15, 1971

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR ST. LUCIE COUNTY, FLORIDA

IN THE INTEREST OF: JUVENILE DIVISION

Wendy Shaw, a Child. CASE NO. 82-500 CJA

_____/

ORDER OF DISPOSITION, COMMITMENT TO THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

THIS CAUSE having come on to be heard February 3, 1983 and this Court being fully advised from the testimony and information provided, herein makes the following findings:

1. That the above juvenile Wendy Shaw is thirteen years of age.

2. That the said Wendy Shaw is a nice looking, attractive, well-built girl.

3. That she has run away from home 10 times.

4. That she has been declared a dependent and and an ungovernable child on 7-2-82.

5. That she was sentenced to the St. Lucie County Youth Hall for a period of one year on 7-2-82.

6. That the Court later released her on 12-23-82 to her parents at which time she ran away.

7. That, as a result of her behavior she was then placed in the St. Lucie County Youth Hall.

8. That she escaped from the above facility on 12-30-82.

9. That she was apprehended and placed in the Detention Center.

10. That this Court found her in Contempt of Court and Ordered that she serve the balance of the above one year sentence as a dependent and delinquent child at the Alyce D. McPherson School.

11. That Wendy Shaw then advised her parents that she was going to run away from the Ocala School and this Court believes that she will.

12. That this Court was advised that the Alyce D. McPherson school was not a secure facility, its fence having been removed years ago for unknown and unjustified reasons and that a secure facility does not exist in the State of Florida for juvenile girls.

13. That this Court knows of no other secure facility for young runaway girls who are a danger to themselves;

THEREFORE THIS COURT ORDERS AND ADJUDGES that Wendy Shaw be committed to the Department and sent to the Alyce D. McPherson School where

she shall be placed in a secure facility and guarded if necessary until further order of this Court.

FURTHER ORDERED AND ADJDUDGED THAT Mr. David Pingree, Secretary of Health and Rehabilitative Services is hereby ordered to see to it that this girl is confined in a secure facility for whatever time is necessary to rehabilitate her. Any failure to do so will be considered contempt of this Court and if proven punished by fine or imprisonment or both.

ALL CONCERNED PARTIES have thirty (30) days in which to appeal this Order.

THIS ORDER SHALL BE SERVED by the Sheriff of Marion County to the Superintendent of the Alyce D. McPherson School, Mr. William R. Schossler. This Order shall further be served by the Sheriff of Leon County to Mr. David Pingree, Secretary of Health and Rehabilitative Services at 1317 Winewood Boulevard, Tallahassee, Florida 32204.

Jurisdiction in this matter is still retained.

DONE AND ORDERED THIS March 4, 1983, nunc pro tunc as of February 28, 1983.

/s/ Philip G. Nourse
CIRCUIT JUDGE

C

626258

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

This cause having been brought to this Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Harry Lee Anstead, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and the seal of the said Court at West Palm Beach, Florida on this day.

Date: September 30, 1983

Case No. 83-591

County of Origin: St. Lucie

D

TC Case #: 82-500 (CJA) Juvenile

Style: State, ex rel Dept of HRS v.
Hon. Philip Nourse

/s/ Clyde L. Heath
Clerk of the District Court
of Appeal of the State of
Florida, Fourth District

Hon. Roger Poitras, Clerk (Orig)
Hon. Philip G. Nourse, Judge
Steven W. Huss, Esq.
K. C. Collette, Esq.

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA, FOURTH DISTRICT
JULY TERM 1983

STATE OF FLORIDA, ex rel
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,
DAVID PINGREE, CASE NO. 83-591

Petitioners,

vs.

PHILIP G. NOURSE, as Circuit
Court Judge of the Nineteenth
Judicial Circuit, in and for
St. Lucie County, Florida

Respondent. /

E

Opinion filed September 14, 1983

On petition for writ of prohibition
to the Circuit Court for St. Lucie
County; Philip G. Nourse, Judge

Steven W. Huss, Assistant General
Counsel, and K. C. Collette,
District IX Legal Counsel,
Department of Health and Rehabilitative
Services, Tallahassee, for Petitioner

Philip G. Nourse, Respondent,
Fort Pierce.

BERANEK, J.

The Department of Health and Rehabilitative Services seeks prohibition. Although this case is now moot, we shall consider it because of its effect upon the administration of the juvenile system and on similar cases. The trial court ordered the Secretary of Health and Rehabilitative Services to personally confine the juvenile to a secure facility and guard her, if necessary. The court had no jurisdiction to direct a specific placement and treatment of an individual committed to the Department of Health and Rehabilitative Services. State ex rel Department of Health and Rehabilitative Services v. Sepe, 291 So.2d 108 (Fla. 3d DCA 1974). Also see Department of

Health and Rehabilitative Services, Division of Mental Health, South Florida State Hospital v. State, 338 So.2d 220 (Fla. 4th DCA 1976). We note, however, that the Department of Health and Rehabilitative Services did place the juvenile in question in the facility ordered by the trial court, and a short time thereafter advised the trial court that the juvenile had again escaped. This juvenile is 13 years old and has run away from home or escaped from HRS facilities on at least eleven occasions. Both the trial court and HRS have exhibited extreme frustration over these unfortunate events. While the juvenile was in the custody of the Department of Health and Rehabilitative Services, she most recently escaped while on an off-campus visit with her parents. We wish we had the answers. We do not. Prohibition is granted because the court does not have the jurisdiction to manage the details of how the Department of Health and Rehabilitative Services will attempt to rehabilitate juveniles.

PROHIBITION GRANTED.

DOWNEY and HERSEY, JJ., concur.

IN THE SUPREME COURT OF
FLORIDA
FRIDAY, OCTOBER 28, 1983

PHILIP G. NOURSE, as Circuit Court Judge of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, **

Petitioner, **

vs. ** CASE NO. 64,359

STATE OF FLORIDA, EX REL DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, DAVID PINGREE, **

Respondents. **

Upon consideration of the Notice of Appeal and/or Petition for Common Law Writ of Certiorari and/or Petition for Writ of Prohibition, it is ordered by the Court that said Notice and/or Petitions are hereby denied.

BOYD, ACTING C.J., OVERTON, McDONALD, EHRLICH and SHAW, JJ., Concur

cc: Hon. Philip G. Nourse, Judge
Hon. Roger Poitras, Clerk
Hon. Clyde L. Heath, Clerk
Steven W. Huss, Esquire
K. C. Collette, Esquire
Michelle Russell, Esquire

A True Copy
TEST:
/s/ Sid White

Sid J. White
Clerk Supreme Court

H